BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS D. LEWIS Claimant VS. **GENERAL MACHINERY OF PITTSBURG** Respondent AND **TWIN CITY FIRE INSURANCE CO.** Insurance Carrier	)	Docket No. 1,054,994

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 15, 2011, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of his employment with respondent. He ordered respondent to pay temporary total disability compensation until further order, until reaching maximum medical improvement or until returned to gainful employment, whichever occurs first. The ALJ further ordered respondent to pay certain medical bills and to provide claimant with medical treatment with Dr. Philip Cedeno and Dr. Newman until reaching maximum medical improvement or until further order of the court.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 6, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent did not file a brief in this appeal, but its Appeal of Preliminary Hearing Order requested review of the compensability of the claim, extent of injuries, and claimant's entitlement to temporary total disability benefits and payment of medical bills.[1]

Claimant argues that he met his burden of proving that he was injured at work and that his injury to his right foot and resulting conditions arose out of the course of his employment. Accordingly, claimant asks the Board to affirm the Order for Compensation of the ALJ.

The issue for the Board's review is: Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent? If so, is his current need for treatment a result of his accidental injury?

FINDINGS OF FACT

Claimant worked for respondent, an industrial supply business, as a warehouse worker and salesman for over 20 years. Claimant worked from 7:30 a.m. to 5 p.m. and at times would not leave the premises, even for lunch. As part of his job, he loaded and unloaded trucks. He said about 5 to 6 delivery trucks a day came in to be unloaded, and he loaded from 15 to 20 trucks a day for customers. Some of the trucks were trash trucks, and at times he was required to get into the trucks. Some trucks, especially the trash trucks, were dirty. Claimant said from time to time things fell off trucks, including nails, screws and glass.

Claimant testified that he has had issues with diabetes which had been diagnosed four or five years ago. At some point, he did not think medications were doing him any good so he lost 100 pounds and was controlling his diabetes without medication. He said he went without medication for at least a year and the symptoms of his diabetes were gone. He said no doctor recommended to him that he quit taking his diabetes medication–he decided that on his own. He had not returned to see a doctor after losing the weight and stopping his medication until after his work-related accident.

Claimant testified that for a long time, even before he was diagnosed with diabetes, he had no feeling in the bottom of either of his feet. However, he does not believe the numbness in his feet is related to his diabetes, since he had the numbness in his feet

[1] The Board does not have jurisdiction of the questions of extent of injuries or claimant's entitlement to temporary total disability benefits and payment of medical bills in an appeal from a preliminary hearing order. See K.S.A. 2010 Supp. 44-551(i)(2)(A) and K.S.A. 44-534a(a)(2). This Board Member, therefore, will only review issues concerning the compensability of the claim that were raised as issues at the preliminary hearing.

before being diagnosed with diabetes. He believes the numbness in his feet was caused by years of continuously walking on concrete.

On January 12, 2011, claimant went to work at his normal time. Sometime in early morning, the sock in his right shoe bunched up, so he took the shoe off, rearranged the sock, and put the shoe back on.[2] At that time, he saw the bottom of his foot and the bottom of the shoe, and there was nothing piercing either the foot or shoe. After that, claimant did not go to lunch or otherwise leave respondent's premises until the end of his shift.

While claimant was working, a truck came in and he had to use the forklift to unload it. He stuck his right foot up onto the forklift, and when he did, it slid. At the time, he assumed it was oil, grease or something else on the bottom of his shoe. At 5 p.m., he was going through the facility closing it down and shutting off the furnaces. At that point, the building was very quiet. As he was walking across the cement floor, he heard a clicking noise. When he got to the front of the building, he pulled his foot up and saw a tack in his shoe, and he pulled the tack out. He showed the tack to a couple of his coworkers. The head of the tack was about 3/4 inch in diameter and the nail part of the tack was about an inch in length. The nail part was bent. He now believes the sliding he heard on the forklift earlier that morning was caused by the metal of a tack against the metal of the forklift.

After pulling out the tack, claimant went straight home and took his shoe off. His sock had a hole in the bottom and was soaked in blood. Claimant had a large puncture wound in the bottom of his right foot about 3/4 inch behind the third toe approximately in the ball of the foot. He cleaned the wound, treated it with an antibiotic, and covered it with a Band-Aid. He reported his injury the next day to his manager. Claimant believes he had the tack in his shoe and foot for an extended part of the day and the nail had bent and was twisting in his foot.

Claimant was able to work the next day and that night returned home and cleaned and dressed the wound again. He did not think he needed to see a doctor at that time. The next morning, however, April 14, 2011, claimant's third toe had started to turn black and the foot was a dark purple color roughly halfway back up the foot so he decided to see a doctor. Claimant went to Via Christi Hospital Occupational Health because it was a work injury. He was admitted to Via Christi Hospital (Via Christi) and came under the care of Dr. Philip Cedeno. While in the hospital, he was treated with antibiotics in hopes of clearing up the infection in his foot. However, the treatment was not successful.

Claimant was re-admitted to Via Christi for amputation of the third toe of his right foot on February 11, 2011, because the toe had gotten so bad. He remained in the hospital until February 23, 2011. While in the hospital, claimant developed a sore on the

[2] Claimant testified that he wore a tennis shoe to work.

heel of his left foot. Claimant said the sore developed from his lying in a hospital bed for so long. His left heel was debrided several times and treated with antibiotics but continued to worsen.

Claimant said he had at least one more hospital visit for treatment of his left foot at Via Christi before Dr. Cedeno referred him to Dr. Newman in Joplin, Missouri, for treatment of his left heel. Claimant continued to be treated with antibiotics, but at some point underwent an amputation of his left heel at St. John's Hospital in Joplin. Claimant cannot remember when he was released from the hospital. He continues to treat with both Dr. Cedeno and Dr. Newman. His dressings are changed three days a week, and he has a wound vac to keep pressure on the wound to help in healing. Claimant has been off work since this injury. He has a limp and walks with a cane, which gives him trouble with his low back. He also has trouble with his right shoulder. This problem developed while he was hospitalized. He has a PICC Line in his right arm.

When claimant initially went to Via Christi, he told the personnel that his guess was that he picked up the tack in respondent's parking lot. Claimant admitted that nothing in particular made him think he picked up the tack in the parking lot. He said respondent's premises consisted of the main building and a storage building with a parking lot between the two buildings. The parking lot is for the sole use of respondent's employees and customers. Claimant said he would walk through the parking lot throughout the day as customers would park there to be loaded. He said the inside of respondent's building is continuously dirty with junk on the floor and no one can keep up with cleaning.

On April 25, 2011, claimant was examined by Dr. Edward Prostic at the request of claimant's attorney. Dr. Prostic found claimant had an industrial injury to his right foot with resultant cellulitis and gangrene resulting in amputation of the third toe. He stated the prognosis for claimant's right foot is guarded and he will likely require a below knee amputation in the future. He noted that claimant had developed a fissure of the left heel for which he was being treated. Dr. Prostic later reviewed records from Via Christi that showed claimant had an ulceration of his left heel while in the hospital. In a letter to claimant's attorney dated June 3, 2011, Dr. Prostic stated: "It is my opinion that the difficulties with the right foot and left heel are a direct result of the work-related accident of January 12, 2011."[3]

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as

[3] P.H. Trans., Cl. Ex. 2.

follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[7] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[8] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[9]

Where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury,

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[4] K.S.A. 2010 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

[7] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[9] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

no award can be granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.[10]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[12]

ANALYSIS

Claimant's injuries are the direct and natural result of the puncture wound injury he sustained at work on January 12, 2011. Claimant testified that early on during his work shift, he had removed his right shoe and sock at work during his work day and there was no tack in his shoe nor injury to his foot at that time. Near the end of his work day, after the machinery had been turned off and it was quiet in the warehouse, claimant was walking on the cement floor of the warehouse and heard a clicking noise. It was then that he discovered the tack in his shoe. Claimant believes he stepped on the tack while working and that the tack had been in his shoe for some time before he noticed it. Claimant's belief in this regard is consistent with the evidence, and there is no contrary testimony. Although claimant initially told personnel at the occupational health clinic that he may have stepped on the tack in respondent's parking lot as opposed to on the floor of the warehouse, this scenario would not alter the compensability of this claim as the parking lot is part of claimant's work area, is part of respondent's premises and is for the exclusive use of respondent's employees and customers.[13]

CONCLUSION

Claimant sustained personal injury to his right foot by an accident that occurred on January 12, 2011, which arose out of and in the course of his employment with respondent. As a direct and natural consequence of that injury, claimant has suffered additional injuries to his left foot, back and right upper extremity.

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[10] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

[11] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[12] K.S.A. 2010 Supp. 44-555c(k).

[13] See *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006)

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Compensation of Administrative Law Judge Brad E. Avery dated June 15, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge